IN THE

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 66.

MARY LOUISE KENADAY, EXECUTRIX, PLAINTIFF IN ERROR AND APPELLANT,

vs.

ARABELLA D. SINNOTT ET ALS.

BRIEF FOR APPELLEES ON THE ASSIGNMENT OF ERRORS BY PLAINTIFF IN ERROR.

STATEMENT OF CASE.

The statement of this case, made in the brief filed herein by appellees, on their motion to dismiss the writ of error and appeal, is deemed sufficient without consuming the time of this honorable court by a restatement here.

Before taking up the errors assigned by plaintiff in error we respectfully call the attention of this honorable court to the objection filed by the appellee Arabella D. Sinnott on record page 24 to any paper being copied into this record in

the orphans' court filed prior to January 20, 1899. The date of the mandate from the Court of Appeals was filed in the orphans' court reversing and remanding this cause. But notwithstanding this objection, all the papers in the case from the probate of the will and appointment and qualification of the executor were copied into the record, thus bringing before the Court of Appeals for a second trial the same record that it had heard and decided on the former appeal at the January term, 1899.

This was done, of course, to get before the Court of Appeals the former record, in order to bring it to this court on appeal or writ of error, and in this way secure an opinion from this court on the case tried by the Court of Appeals at its January term, 1899, and from which the executrix had not appealed nor sought to reverse by writ of error.

It is therefore now respectfully submitted that this honorable court is not called upon in this case to go behind the mandate of the Court of Appeals filed in the orphans' court January 20, 1899, and to examine and review the action of the Court of Appeals on that former appeal.

In case, however, this honorable court shall deem it proper to examine this entire record and pass upon all the questions raised and sought to be raised by this executrix, we respectfully submit the following brief upon the several errors assigned herein by the plaintiff in error:

First. It is assigned as error that the orphans' court for the District of Columbia has no jurisdiction to order distribution by an executrix of a residue found in the settlement of her final account to be in her hands, nor has it jurisdiction in passing upon said final account to examine and construe the will of the testator to see to whom that residue belongs.

The Court of Appeals held the orphans' court did have this power and jurisdiction.

The opinion of the Court of Appeals, which is full and clear (but which the plaintiff has not made a part of this

record), shows beyond question that the orphans' court has full, ample, and complete power and jurisdiction to do these very things.

The orphans' court of the District of Columbia derives its powers and jurisdiction from the testamentary act of Maryland of 1798, chapter 101.

This act embodies in its various provisions a testamentary and administrative system intended to be complete in itself. The title is "An act for amending and reducing into one system the laws and regulations concerning last wills and testaments, the duties of executors, administrators, and guardians, and the rights of orphans and other representatives of deceased persons."

The Court of Appeals in its opinion says:

"In an act so comprehensive as that of 1798, intended to embrace the whole law of administration of decedent's estates, if it had been the intention of the legislature to exclude the jurisdiction of the orphans' court in respect to the surplus or residue of the personal estate of the deceased, undisposed of by his will, and to confide that jurisdiction exclusively to a court of equity, and thus, in such case, to divide the administration between the two tribunals, we should certainly find some provision in the statute relating to such an exception from the jurisdiction of the orphans' court. But nothing of the kind appears in the act. * * *

"There is no lack of provision in the act conferring power and jurisdiction upon the orphans' court to make and enforce distribution of the residue of a testator's estate which has not, by any express terms of his will, been disposed of: the power and jurisdiction of that court being ample to superintend and direct full and complete administration of as well the estates of testators as those of intestates.

"By sec. 21 of subch. 15, the orphans' court is instituted 'for the purpose of taking the probate of wills, granting letters testamentary and of administration; *directing the conduct and settling the accounts of executors* and administrators, securing the rights of legatees, superintending the distribution of the estates of intestates, securing the rights of orphans and legatees, and *administering justice in all matters relative to the affairs of deceased persons, according to law.*' By

sections 6 and 10 of subch. 10, relating to the duties of executors and administrators, it is, by the first of these sections, provided, that 'it shall be the duty of an executor, upon the settlement of his account showing that all debts and claims are paid, to deliver up the estate in his hands to those entitled to receive it.'

By section 12 of subch. 15 among other things it is provided that—

"The orphans' court shall have full power, authority, and jurisdiction, to examine, hear, and decree upon, all accounts, claims, and demands, existing between wards and their guardians, and between legatees, or persons entitled to any distributable part of an intestate's estate, and executors and administrators, and may enforce obedience to, and execution of, their decrees, in the same ample manner as the court of chancery may."

"These provisions of the statute," says the Court of Appeals, "are certainly ample to confer authority and jurisdiction upon the orphans' court, or the special term of the supreme court exercising the jurisdiction of the orphans' court, to direct and enforce the distribution of the undisposed-of residue of the personal estate of the testator, in this case; and we are clearly of opinion, that the executrix, the widow of the deceased, did not take, by any construction of the will, any beneficial right or estate in such undisposed-of residue, as distinguished from her title merely as executrix; and that such undisposed-of residue must be distributed to the next of kin of the testator."

For opinion in full of the Court of Appeals in this case, see 14 Dist. Court of Appeals Repts., p. 1.

In the face of these plain provisions of this statute, it is difficult to treat this assignment of error as seriously made by this executrix; but when we go a step farther and consider that these proceedings were instituted in the orphans' court by this executrix herself and not by these appellees, then we feel justified in insisting before this honorable court that these assignments of error and this writ of error and this appeal are all frivolous and intended only to delay the pay-

ment to these appellees of this residue in the hands of this appellant. On record page 4 will be found an order obtained from the orphans' court on June 10, 1898, on the *ex parte* application of this executrix, fixing Friday, July 8, 1898, at 10 o'clock a. m., as the time and that court as the place for a meeting of creditors or persons entitled to distributive shares or legacies or a residue and directing that a notice be published once a week for three weeks in the "Washington Law Reporter," notifying such persons to attend in person or by attorney or agent duly authorized, &c. Thus was these proceedings begun and this litigation started by this executrix in the orphans' court.

This notice recites that that time and place was appointed "for making payment and distribution under the court's direction and control," &c. It was in pursuance of this order and notice that these appellees came into the orphans' court on the 8th day of July, 1898, and filed their petition setting forth their claims as the next of kin and distributees of the testator, Alexander M. Kenaday, deceased, as well as legatees under his will.

See Record, p. 5.

Thereupon this executrix filed with said court her final account in full settlement of the personal estate and submitted same to said court for its examination, and asked that same be passed and approved.

In this final account she showed there was a balance consisting of United States 4 per cent. registered bonds amounting to $9,218.76, which she had, as she stated, *distributed to herself*, claiming that it belonged to her under a clause in the second *item* of the will.

See Record, pp. 7 and 8.

These appellants, who are the next of kin of the decedent and legatees under his will, naturally objected to such summary appropriation of these bonds and excepted to this ac-

count and asked the orphans' court not to pass and approve the same, but that court did pass and approve it, and they thereupon appealed from such approval to the Court of Appeals of the District of Columbia, and there this executrix made the argument that the orphans' court had no power or jurisdiction in the matter. This assignment of error puts the executrix, therefore, in the position of saying—

"It is true that I instituted these proceedings in the or-
"phans' court and had these appellees brought there, and I
"submitted my account to said court for its *approval*. That
"court had the power to *approve* my account, but it has not
"the power to *disapprove it*."

We submit that there is no error in the ruling of the Court of Appeals on this point, and that this executrix has brought this cause here upon a most frivolous assignment of error.

The second point assigned as an error is that the Court of Appeals is wrong in deciding that the residue of this personal estate, consisting of United States 4 per cent. registered bonds amounting to $9,218.76, did not go to appellant, but passed to these appellees as the next of kin of the decedent.

Appellant, in her final account, on record page 8, states that she has retained this balance of $9,218.76 as her own, as a "bequest to her by the testator" of "notes and evidences of indebtedness to me," "deposits of currency entered on my bank book," &c. On record page 12, *fourth* paragraph, she says:

"The executrix has distributed to herself, what remains of the personal estate, after paying the legacies to other persons, because it comes under the designations of 'evidences of indebtedness,' 'deposits of currency,' &c., which are bequeathed to her. She is advised that in any case she would be entitled to retain the same as executrix, until the next of kin obtained a decree in equity making her trustee for them, upon a construction of the will."

Here, then, we have the whole contention of appellant: First, that this residue of $9,218.76 was bequeathed to her

under those expressions in the will. But if she is mistaken in that she can nevertheless hold this residue until a court of equity declares her a trustee for these distributees.

This record, page 2, shows that the will in this case was executed April 3, 1894.

The certificate of the Register of the United States Treasury, on record page 11, shows that on April 23, 1889, there were standing in the name of Alexander M. Kenaday (this testator) four registered bonds of the United States (known as 4 per cent. consols of 1907), as follows:

Bond No. 71519, for	$500.00
" " 37400, "	5,000.00
" " 37401, "	5,000.00
" " 37402, "	5,000.00
Making a total of.....	$15,500.00

And on April 1, 1895, one year after the execution of his will, there were registered in his name five other United States 4 per cent. bonds, as follows:

Bond No. 44,695, for	$5,000.00
" " 183,336, "	1,000.00
" " 183,337, "	1,000.00
" " 183,338, "	1,000.00
" " 183,339, "	1,000.00
Making a total of.....	$9,000.00

These bonds were acquired one year after the date of execution of his will by Mr. Kenaday, and these are the bonds which constitute the residue of the estate and are claimed by the executrix to have been intended to be given to her by the clause in the second item of the will, "notes and evidences of indebtedness to me, of more or less value," &c. Not only does this fact that he did not own these bonds at

the time he executed this will refute any such idea or construction, but the very next item in the will itself refutes it.

In *items* one and two the testator gives to the wife (the executrix and appellant herein) his real estate and certain claims in the courts in relation to said real estate, and, after enumerating these claims, he adds:

"Also 200 shares of Sutro Tunnel stock and Comstock bonds; also notes and evidences of indebtedness to me, of more or less value; also deposits of currency entered on my bank book of the National Metropolitan bank amounting to $10,000.00 more or less."

Then in the *very next item* he says:

"*Item.*—I give devise and bequeath to my beloved sister Arabella D. Sinnott, residing in New Orleans La., twelve thousand dollars in registered U. S. 4 % bonds, on special deposit in the National Metropolitan bank.

"*Item.*—I give devise and bequeath to the surviving children of my deceased sister, Martha J. Piles, out of the residue of 4 % bonds, deposited as aforesaid ($3,500.00) as follows: To Mrs. Belle Hubert $500.00, to Wm. A. Piles $500.00, to Ida Piles $500.00, to Eloise Piles $500.00, to Edith K. Piles $750.00, to Henry C. Piles $250.00."

These two *items*, following immediately after the *item* containing the clause "also notes and evidences of indebtedness to me of more or less value," show conclusively that the testator had no allusion whatever to his United States bonds by that clause. The legacy to his sister Arabella D. Sinnott of $12,000 United States 4 per cent. registered bonds and the $3,500 United States 4 per cent. registered bonds to the children of his deceased sister Martha J. Piles disposed of all the United States registered bonds he had at that time. This residue of $9,218.76 is the five United States 4 per cent. bonds acquired by the testator one year after he executed this will, to wit, April 3, 1895.

The next position appellant assumes is that even if these

bonds do not belong to her she can nevertheless retain them until we obtain a decree in a court of equity declaring her a trustee for our benefit as to same. This position is fully met under the question as to the jurisdiction and power of the orphans' court. The statutes there cited show conclusively that the orphans' court can compel her to distribute these bonds to the next of kin without any resort to a court of equity.

The next error assigned is that the Court of Appeals is in error in holding that the widow is not entitled to at least one-half of this $9,218.76 residue not bequeathed by the will.

A sufficient answer to this is that the Court of Appeals did not so hold and did not pass on the question for the reason that no such point was raised when the case was tried before the Court of Appeals on its merits. This was an *afterthought* of the appellant, and evidently thrown in as a makeshift to try and give some appearance of cause for her writ of error.

But had the Court of Appeals so held it would have been right. The statute settles this claim against this widow, and it is necessary only to cite it. The act of Maryland, above cited, of 1798, chap. 101, subchap. 13, sec. 1, declares:

> "Every devise of land or any estate therein, or bequest of personal estate, to the wife of the testator, shall be construed to be intended in bar of her dower in lands, or share of the personal estate respectively unless otherwise expressed in the will."
>
> See Compiled Statutes of the Dist. of Columbia, p. 35, sec. 157.

This act also provides how the widow may renounce in writing a bequest or legacy within 90 days from the probate of will and by so doing be reinstated to her dower rights and right to share in the personal estate.

The will shows in this case a very handsome bequest of three valuable houses and lots in the city of Washington,

which was all the realty he owned and a most handsome provision in the way of legacies.

Not having renounced these bequests and legacies, she is, of course, under the statute, barred from any claim to a share in this residue of United States bonds, not disposed of by the will of the testator.

We respectfully submit that the learned counsel for the executrix must have known of this statute, and that this executrix could not claim any share of this residue as widow, and we again submit to this honorable court that this assignment of error also is frivolous and bears out the position we respectfully urge before this honorable court, that this entire litigation, this writ of error, and appeal have been for delay only. We therefore respectfully submit that the decree below should be affirmed and damages, at the rate of 10 per cent., in addition to interest, be awarded appellees.

F. P. B. Sands,
Wm. A. Milliken,
Solicitors for Appellees.